

401 WATER QUALITY CERTIFICATION FREQUENTLY ASKED QUESTIONS

What is 401 Water Quality Certification and how do I know if I need it?

Section 401 of the Clean Water Act requires that any person applying for a federal permit or license which may result in a discharge of pollutants into waters of the United States, must obtain a state water quality certification that the activity complies with all applicable water quality standards, limitations, and restrictions. No license or permit may be issued by a federal agency until certification required by Section 401 has been granted. Further, no license or permit may be issued if certification has been denied.

The following permits or licenses are subject to section 401 of the Clean Water Act:

- Clean Water Act section 404 permits and authorizations;
- Permits issued under sections 9 and 10 of the Rivers and Harbors act;
- Licenses for hydroelectric power plants issued by the Federal Energy Regulatory Commission under the Federal Power Act; and
- Licenses issued by the Nuclear Regulatory Commission.

Water quality standards, according to the Clean Water Act (40 CFR 131), include:

- Beneficial Uses - defined as the uses of water necessary for the survival or well being of man, plants, and wildlife. Beneficial uses are designated in the Basin Plan for water bodies within the region. Examples include agriculture, recreation, wildlife habitat, and warm water aquatic habitat.
- Water Quality Objectives - numeric and/or narrative limits or bans on substances, water characteristics, and activities.
- Antidegradation Policy - requires that existing high-quality waters be protected and maintained.

If you have a waters of the United States (e.g., creek, drainage with or without water flow, wetland) on your property, and you intend to dredge or fill waters of the U.S., then 401 water quality certification is necessary. If you are not sure if you have a waters of the U.S. on your property, consult an expert; do not assume that you do not, as you may be subject to civil and criminal penalties if a waters of the U.S. is dredged or filled without authorization.

How can I get a 401 application?

Applications can be picked up at the Regional Board office, downloaded from the web, or faxed. To request an application by fax, please contact the Regional Board at 858-467-2952.

Applications may be picked up at the Regional Board office on 9174 Sky park Court, Suite 100; San Diego, CA 92123. Applications can be downloaded in Adobe Acrobat at:
www.swrcb.ca.gov/rwqcb9/Programs/Special_Programs/401_Certification/401_certification.html

What are the timelines for processing a 401 application?

The Regional Board has 30 days following receipt of an application to notify the applicant if their application is complete or incomplete. If the application is incomplete, the Regional Board has another 30 days to review submitted material and determine if the application is complete. The applicant does not have a time line for submittal of materials, but delays in submitting the required material can result in delays in processing the 401 application. If the Regional Board

fails to notify the applicant regarding the completeness of an application, the application is deemed complete 30 days following receipt by the Regional Board, per the Permit Streamlining Act.

Once an application has been deemed complete, the Regional Board can request materials to clarify impacts, mitigation, or other aspects of the application. The Regional Board has between 60 days and 1 year in which to make a decision. If processing and review of the 401 application will take more than 60 days, the Regional Board will request additional time from the Army Corps of Engineers (Corps). This usually occurs when an applicant has not supplied requested information or the project is complex and issues have not been resolved. If the Corps does not grant a time extension, the Regional Board has the option of denial without prejudice. This is not a reflection on the project, but a means to stop the clock until the required information has been provided.

The Regional Board also has a public comment period that last a minimum of 21 days. The period closes when the Regional board decides to take an action on the 401 application. The public comment period does not close after a certain number of days because proposed projects tend to change through the 401 process and the public is allowed to review and comment on the changed project. The public comment period starts shortly after an application has been received. Further information on public notification is provided below.

What are the regulatory requirements for an application to be determined complete?

1. Completely filled out application form.
2. Full, technically-accurate description, including the purpose and final goal of the entire activity [23 CCR § 3856(b)].
3. Complete project description [23 CCR § 3856(h)(1-8)] including:
 - Jurisdictional Wetland Delineation
 - Mitigation and Monitoring Plans
 - Any other documents relating to water quality and beneficial uses
 - Grading Plans and/or final conceptual engineering drawings and detailed maps
4. A detailed description of all measures to be taken to prevent the proposed project from adversely affecting the water quality and beneficial uses of the water body(ies) to be impacted.
5. Identification of the federal license/permit (i.e., agency, type, NWP number, file number) [23 CCR § 3856(c)]
6. Copies of federal application, notification, agency-applicant correspondence, or signed statement that none is applicable [23 CCR § 3856(d)]
7. Copies of any final or (if not final) draft federal, state, or local licenses, permits, or agreements concerning the project (i.e., Fish and Game Streambed Alteration Agreement). If none are available, a list of those being sought. [23 CCR § 3856(e)]
8. A draft or final CEQA document. [23 CCR § 3856(f)]. Note: Per the Permit Streamlining Act, final CEQA documentation cannot be required for a complete application; however, per CEQA, a final document must be reviewed before the Regional Board can take an action on your project.
9. The correct fee deposit. [23 CCR § 3856(g)].

Please note that this information is required for your application to be determined complete. Once the Regional Board has determined that an application is complete, it may request further information from the applicant. Such information must clarify, amplify, correct, or otherwise supplement the contents of a complete application in order for the certifying agency to determine

whether a certification should be issued. Supplemental information may include evidence of compliance with appropriate requirements of a water quality control plan.

What other permits might be necessary for impacting a waters of the U.S.?

The California Coastal Commission. The California Coastal Act of 1976 requires any person proposing to undertake development in the Coastal Zone to obtain a Coastal Development Permit. The Coastal Zone extends inland anywhere from approximately 500 yards in developed urban areas to five miles in undeveloped areas. If projects are proposed in or adjacent to existing or historic coastal wetland areas, they will require Coastal Development Permits issued by the Coastal Commission. To find out if your project is in the Coastal Zone you should contact the planning division of your local government.

California Department of Fish and Game. The California Department of Fish and Game requires a Streambed Alteration Agreement (SAA) for projects that will divert or obstruct the natural flow of water, change the bed, channel, or bank of any stream, or propose to use any material from a streambed. The SAA is subject to the California Environmental Quality Act and all information necessary for stream projects must be disclosed.

The Army Corps of Engineers. The regulatory authority of the Corps of Engineers for creek projects is based on Section 404 of the Clean Water Act and Section 10 of the Rivers and Harbors Act. Section 404 of the Clean Water Act requires Corps authorization for work involving placement of fill or discharge of dredged materials into any "waters of the United States". Section 10 of the Rivers and Harbors Act requires Corps authorization for work or structures in or affecting "navigable waters". Corps jurisdiction extends up to the ordinary high water line for non-tidal waters and up to the line of high tide (for dredge or fill), or mean high water line (for work or structures) for tidal waters.

U.S. Fish and Wildlife Service. The U. S. Fish and Wildlife Service reviews and comments on projects pursuant to the Fish and Wildlife Coordination Act, the Clean Water Act, and the National Environmental Policy Act. The Service's comments focus on the effects of projects on all fish and wildlife resources and the habitats that support those resources. Such projects may be, but not limited to, flood control, urban and industrial development, habitat restoration activities, etc. The Service also reviews projects for their affects pursuant to the Federal Endangered Species Act (Act). The Act, through Section 9, prohibits the take of any species listed as threatened or endangered pursuant to the Act without a specific exemption. The term "take" is broadly defined and if "take" is going to occur a permit from the Service is required. If there is another Federal Agency involved then exemption from the "take" provisions of the Act can be achieved through a Section 7 process. If there is no Federal involvement than a permit pursuant to Section 10, also known as a Habitat Conservation Plan, will be needed.

National Marine Fisheries Service. The National Marine Fisheries Service (NMFS) is the federal agency responsible for the conservation and management of the nation's living marine resources. Projects or activities that may affect marine fish and related habitat within NMFS jurisdiction are reviewed for any potentially harmful effects. These evaluations are conducted under the authorities of the Endangered Species Act (ESA), Magnuson-Stevens Fishery Conservation and Management Act, Fish and Wildlife Coordination Act, and the National Environmental Policy Act. The purpose of reviews conducted by NMFS is to ensure that sensitive populations of marine and anadromous fish (such as salmon and steelhead), as well as the aquatic and riparian habitat that support these fish, can survive and re cover in the presence of human activities. Through these reviews, the need to conserve and protect fish and habitat is balanced with the

need to responsibly utilize natural resources for economic and other purposes. The types of projects and activities of interest to NMFS include streambank stabilization, streambed alteration, habitat restoration, flood control, urban and industrial development, and water resource utilization. When projects or activities require a federal permit, such as a Clean Water Act section 404 permit from the Army Corps of Engineers, then NMFS conducts a consultation with the federal agency under section 7 of the ESA. When there is no federal involvement, then for projects that incidentally "take" a listed species a permit under section 10 of the ESA is required.

There may also be regulatory requirements associated with city and county ordinances. The applicant is responsible for knowing all the applicable rules and regulations, and for compliance with them.

What are the fees for processing a 401 application?

Per 23 CCR § 3856(g), the fees for 401 Water Quality Certification are:

- If there is no potential for water quality impacts, as determined by Regional Board staff, and Standard Certification will be issued, the filing fee is \$500 to cover processing costs.
- If there is a potential to have water quality impacts and Conditional Certification will be issued, the filing fee is as follows:
 - Fill** - \$1,000 per acre or part thereof, up to the statutory maximum of \$10,000
 - Dredge** - Less than 10,000 cubic yards - flat fee of \$500. 10,000 to 20,000 cubic yards - flat fee of \$2,000. More than 20,000 cubic yards - \$2,000 plus \$250 for each additional 5,000 cubic yards or part thereof, up to the statutory maximum of \$10,000.
- A deposit of \$500.00 will be required upon submittal of the application. If Regional Board staff determines that an additional fee is required, certification will not be issued until that fee has been paid in full.

Where can I get a copy of the 401 regulations?

Copies of the current regulations are available online at:
www.swrcb.ca.gov/water_laws/index.html

Who should I contact with questions regarding 401?

If your project occurs within the Carlsbad, San Luis Rey, Santa Margarita, or San Juan Hydrologic Unit, contact Stacey Baczkowski at 858-637-5594. If your project occurs within the San Dieguito, Penasquitos, San Diego, Sweetwater, Otay, or Tijuana Hydrologic Unit, contact Michael Porter at 858-467-2726.

Hydrologic unit boundaries are identified in the Basin Plan.

When should I submit my 401 application?

Applications are typically submitted concurrently with submittals to the Corps and CDFG. The Regional Board encourages you to submit a complete application as soon as possible. Due to the varying degree of complexity between 401 applications, the time necessary to review and process an application can vary greatly. It is to the applicants advantage to submit 401 application concurrently with 404 applications and to hold joint meetings with all resource agencies. This will help facilitate communication and coordination between the applicant and the agencies. Also, a 401 certification is required before a 404 permit or authorization can be issued; therefore, it is in the applicants best interest to submit a complete application as soon as possible.

May I consult with Regional Board staff prior to submitting my application?

Regional Board staff encourages applicants to discuss their project prior to final design. Staff also attend pre-application meetings sponsored by the California Department of Fish and Game and Army Corps of Engineers; please contact the local offices for their meeting schedules.

Where do I send my application?

Your application should be sent to:

Mr. John Robertus
Regional Water Quality Control Board
San Diego Region
9174 Sky Park Court., Suite 100
San Diego, CA 92123

What is the public notification period and is it the same as the Army Corps of Engineers public notice period?

The California Code of Regulations, Section 3858(a) states “The executive director or the executive officer with whom an application for certification is filed shall provide public notice of an application at least twenty-one (21) days before taking certification action on the application, unless the public notice requirement has been adequately satisfied by the applicant or federal agency. If the applicant or federal agency provides public notice, it shall be in a manner and to an extent fully equivalent to that normally provided by the certifying agency. If an emergency requires that certification be issued in less than 21 days, public notice shall be provided as much in advance of issuance as possible, but no later than simultaneously with issuance of certification.”

Public notice of pending 401 Water Quality Certification applications within the San Diego Region is available on the Regional Board’s web site at
http://www.swrcb.ca.gov/rwqcb9/Programs/401_Certification/401_certification.html.

The Regional Boards public notice period is separate and distinct from the Corps public notice. Public comments will be accepted on a pending 401 application until an action is taken. An action will not occur within the 21-day comment period unless the project is an emergency and time is of the essence.

What is the Basin Plan and how can I get a copy?

Each of the nine Regional Boards within California are required to adopt a Water Quality Control plan, or Basin Plan, which recognizes and reflects the regional differences in existing water quality, the beneficial uses of the Region’s ground and surface waters, and local water quality conditions and problems. The San Diego Regional Board’s Basin Plan is designed to preserve and enhance water quality and protect the beneficial uses of all regional waters. Specifically, the Basin Plan: (1) designates beneficial uses for surface and ground waters; (2) sets narrative and numerical objectives that must be attained or maintained to protect the designated beneficial uses and conform to the state’s antidegradation policy; (3) describes implementation programs to protect the beneficial uses of all waters in the region; and (4) describes surveillance and monitoring activities to evaluate the effectiveness of the Basin Plan.

Copies of the Basin Plan may be obtained by contacting the Regional Board at 858-467-2952, or may be obtained online at:
www.swrcb.ca.gov/rwqcb9/Programs/Planning_and_Services/SD_Basin/sd_basin.html

What is the relationship between 401 and stormwater construction regulations and requirements?

There is no regulatory connection between 401 Water Quality Certification and construction stormwater permits; in other words, one is not a requirement of the other. Some of the information developed for a Stormwater Pollution Prevention Plan (SWPPP) will be necessary for the 401 permit. For example, BMPs to control urban runoff during construction and over the life of the project will need to be addressed during the 401 permit process as well as in the SWPPP. Submittal of a SWPPP to supply information for a 401 application does not satisfy construction stormwater requirements.

What are the possible 401 decisions?

After review of the application, all relevant data, and any recommendations of a Regional Board, other state and federal agencies, and any interested person, the state board, the executive director, when acting as the state board's designee, or executive officer shall issue certification or deny certification for any discharge resulting from a pertinent activity before the federal period for certification expires. Conditions shall be added to any certification, if necessary, to ensure that all activities will comply with applicable water quality standards and other appropriate requirements. If certification is denied, the applicant shall be notified in writing of the denial and the reasons for the denial.

An application for water quality certification may be denied when:

- the activity requiring a federal license or permit will result in a discharge which will not comply with applicable water quality standards and other appropriate requirements; or
- compliance with water quality standards and other appropriate requirements is not yet necessarily determined, but the application suffers from some procedural inadequacy (e.g., failure to provide a complete fee or to meet CEQA requirements). In this case denial shall be without prejudice.

I have completed 401 applications for other Regional Boards, are they the same?

Each Regional Board has different 401 applications. You are responsible for submitting the correct application to the correct region. If you are unsure of which application to use, or if your project is on the border of two regions, please contact the Regional Board prior to submittal; this can help avoid delays and confusion in reviewing your application.

The Corps said I don't need a permit, do I need 401 certification?

If your project is located within or adjacent to a waterway, or can potentially impact a waterway, the Regional Board and the Department of Fish and Game (DFG) probably regulate it. The Corps classifies some projects as minimal impact under the Nationwide Permit Program (NWP). If your project fits into one of 40 NWP categories, the project may come under the Corps general permit conditions. Some NWPs do not even require advance notification to the Corps.

Section 401 of Clean Water Act grants each state the right to ensure that the State's interests are protected on any federally permitted activity occurring in Waters of the State. In California, the Regional Water Quality Control Boards are the agency mandated to ensure protection of the State's waters. So if a project comes under the Corps' jurisdiction, California also regulates it also to ensure and certify compliance with state regulations.

California does not feel as such, that most of the 40 activities under the Nationwide Program are of minimal impact. The State has not provided advance approval of most of the Nationwide Permits. Although the activity may be covered under a general permit from the Corps, you will still need to get a permit from the State of California.